ATTORNEYS FOR APPELLANT:

JOLEEN V. KLOTZ
JAMES O. McDONALD
Everett, Everett & McDonald
Terre Haute, Indiana

ATTORNEY FOR APPELLEE:

KEITH L. JOHNSON
Johnson Law Office
Terre Haute, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MADELINE WILSON, on behalf of herself and her deceased husband, DON WILSON,	)	
Appellant-Defendant,	)	
vs.	)	No. 83A05-0509-CV-508
SPURR ENTERPRISES, INC.,	)	
Appellee-Plaintiff,	)	
and	)	
JERRY SPURR AND PATTY SPURR,	)	
Appellees-Third Party Defendants.	)	

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Diana LaViolette, Special Judge
Cause No. 83C01-0311-CC-196

September 13, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Appellant-Defendant/Counterclaimant/Third-Party Plaintiff Madeline Wilson ("Wilson") appeals a judgment entered against her upon a complaint for collection of a debt owed to Appellee-Plaintiff/Counterclaim Defendant Spurr Enterprises, Inc. ("Spurr Enterprises"). Wilson also appeals the grant of summary judgment to Spurr Enterprises upon Wilson's abuse of process claim. Finally, Wilson appeals an award of attorney fees in favor of Appellees/Third-Party Defendants Jerry Spurr and Patty Spurr (collectively, "the Spurrs") upon Wilson's third-party complaint for conversion. Wilson presents three issues for review, of which the following is dispositive:

> Whether the grant of summary judgment in favor of Spurr Enterprises, Jerry Spurr, and Patty Spurr was erroneous.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

The Spurrs, as shareholders of Spurr Enterprises, own and operate a storage facility in Vermillion County, Indiana. In November of 1993, Wilson's vehicle was placed in a storage unit, where it remained until June of 2004. The rent for the unit was initially $10.00 per month, and was subsequently increased to $20.00 per month. Over the years, Wilson and her husband Don Wilson (now deceased) (collectively, "the Wilsons") made sporadic rental payments.

On November 17, 2003, Spurr Enterprises filed a complaint against the Wilsons in the Vermillion Circuit Court. The complaint alleged that $1,780.00 was due for storage fees, and

requested a judgment lien against Wilson's vehicle. On December 5, 2003, Spurr Enterprises filed a "Motion for Pre-Judgment Attachment." In the motion, which was granted on the same day, Spurr stated that it had "a good faith basis to believe" that the Wilsons were "about to liquidate their assets and move out of the Court's jurisdiction" and that "holding such a sale is in violation of both Indiana's civil and criminal code." *Appellant's App.* at 66. The pre-judgment attachment order prohibited the Wilsons from disposing of any property, real or personal. Later that day, attorney Jon Spurr, acting on behalf of Spurr Enterprises, went to Wilson's home, took yard sale proceeds from her, recorded the amounts, and transferred them to Wilson's attorney for placing in escrow.

Wilson answered the collection complaint and counter-claimed against Spurr Enterprises for abuse of process. Wilson also initiated a third-party complaint against the Spurrs, alleging that the Spurrs, acting individually, had converted her vehicle by denying her access to it. Wilson also filed a "Verified Motion to Lift Stay," and filed documents in the trial court indicating that the sale of her residence was pending. Wilson agreed to place $1,800.00 from the residence sale proceeds into her counsel's trust account pending the outcome of the litigation. On January 5, 2004, the trial court vacated the December 5, 2003 order granting prejudgment attachment.

On April 18, 2005, Spurr Enterprises and the Spurrs filed a motion for summary judgment and designation of evidence. Following a hearing, the trial court granted summary judgment to Spurr Enterprises and the Spurrs upon Wilson's counterclaim and third-party claim. With respect to the collection claim, the trial court entered summary judgment against Wilson on the issue of liability. However, the trial court's order advised the parties that a

"hearing on Plaintiff/Counterdefendants damages" would be held on Tuesday, July 26, 2005 at 9:00 a.m. in the Vermillion Circuit Court.

On July 26, 2005, the parties appeared in Putnam County before Special Judge Diana LaViolette. Over Wilson's objection that she had requested a jury trial, the trial court conducted a hearing on the amount due Spurr Enterprises. On August 25, 2005, the trial court issued an order providing in pertinent part as follows:

> The parties having submitted briefs regarding Defendant's objection to trial of this matter to the Court, and the Court having considered same and being duly advised, finds that the parties knowingly and voluntarily agreed to try this case to the Judge in Putnam County on the issue of damages, which agreement is binding on the parties and counsel.
>
> Defendant's objection to the bench trial and demand for trial by jury in Vermillion County are denied and otherwise overruled.

Appellant's App. at 12. On August 30, 2005, the trial court entered judgment against Wilson in the amount of $1,980.00, plus prejudgment interest of $941.60. Finally, the trial court awarded to Spurr Enterprises and the Spurrs the amount of $3,031.25 as attorney fees and expenses "pursuant to I.C. 34-52-1-1."[1] *Appellant's App*. at 13. Wilson now appeals.

DISCUSSION AND DECISION

Wilson argues that the trial court erred by granting summary judgment to Spurr Enterprises upon her counter-claim for abuse of process. She points to "harassing" and

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[1] Indiana Code Section 34-52-1-1(b) provides:

> In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or

"embarrassing" conduct by attorney Jon Spurr ("Jon"), and to procedural irregularities in the attachment proceedings. More specifically, she claims that an abuse of process occurred because: Spurr Enterprises already had possession of adequate collateral and the attachment order was unnecessary; Jon humiliated and harassed her by interrupting her yard sale and accusing her of felonious behavior in front of other people; she was not provided notice and a hearing prior to the trial court's grant of the attachment motion; Jon did not advise the trial court that Wilson's financial difficulties arose from her husband's terminal illness; and the attachment order was not executed by the Sheriff, as contemplated by Indiana Code Section 34-25-2-6.

Pursuant to Rule 56(C) of the Indiana Rules of Trial Procedure, summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Our standard of review is the same as the trial court's when reviewing a grant of summary judgment. *Kelley v. Tanoos*, 840 N.E.2d 342, 346-47 (Ind. Ct. App. 2005). We consider only those facts that the parties designated to the trial court. *Id.* The Court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. *Shambaugh & Son, Inc. v. Carlisle*, 763 N.E.2d 459, 461 (Ind. 2002). A trial court's order on summary judgment is cloaked with a presumption of validity; the party appealing from a grant of summary judgment must bear the burden of persuading this Court that the decision was erroneous. *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699 (Ind. Ct. App.

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(3) litigated the action in bad faith.

2005), *trans. denied*. We may affirm the grant of summary judgment upon any basis argued by the parties and supported by the record. *Kelley*, 840 N.E.2d at 347.

An abuse of process claim contains two distinct elements, and a party must first establish that the defendant employed improper process before the court proceeds to examination of the defendant's motivation. *See Reichart v. City of New Haven*, 674 N.E.2d 27, 31 (Ind. Ct. App. 1996), *trans. denied*. A party will be held liable for abuse of process if the legal process has been misused for an end other than that which it was designed to accomplish. *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1029 (Ind. Ct. App. 2005), *trans. denied* (citing *Nat'l City Bank, Ind. v. Shortridge*, 689 N.E.2d 1248, 1252 (Ind. 1997), *opinion supplemented on other grounds*, 691 N.E.2d 1210 (Ind. 1998)).

In support of its motion for summary judgment, Spurr Enterprises designated Wilson's answers to interrogatories, wherein she acknowledged owing a debt to Spurr Enterprises. Spurr Enterprises also designated Jon's affidavit, wherein he averred that he commenced an action to collect unpaid storage fees, saw an advertisement for Wilson's moving sale, and obtained a pre-judgment attachment order after posting a cash bond of $1,800.00.

While the designated materials were sufficient to establish that there was a debt owing by the Wilsons to Spurr Enterprises for the storage of the vehicle -- a fact which the Wilsons did not deny -- they fail to resolve the following issues of fact:

First, whether there was a good faith basis for seeking the extraordinary remedy of prejudgment attachment of all of the Wilsons' real and personal property;

Second, why notice of seeking the prejudgment attachment could not be given to the Wilsons;

Third, whether there was any basis for Spurr Enterprises' representation to the trial court that the Wilsons were about to move out of the court's jurisdiction;

Fourth, whether there was any basis for Spurr Enterprises' representation to the trial court that the Wilsons' sale of their assets was in violation of Indiana's civil and criminal code;

Fifth, whether Spurr Enterprises' failure to disclose to the trial court that it held collateral for the indebtedness in the form of a possessory lien upon the vehicle was a material omission withheld for the purpose of obtaining a prejudgment attachment to which it otherwise may not have been entitled;

Sixth, whether the value of the collateral held by Spurr Enterprises was sufficient to satisfy the indebtedness, thus giving Spurr Enterprises an adequate remedy at law and rendering the prejudgment attachment improper;

Seventh, whether Spurr Enterprises or Jerry Spurr or Patty Spurr individually denied the Wilsons access to their vehicle;

Eighth, whether any such denial constituted a conversion or impaired the value of the collateral;

Ninth, whether the self-help execution of the prejudgment attachment order by counsel for Spurr Enterprises was in accordance with law;

Tenth, whether counsel for Spurr Enterprises falsely and publicly accused Madeline Wilson of committing a felony and subjected her to public humiliation in the course of his self-help execution of the prejudgment attachment order.

If these questions were to be resolved in favor of the Wilsons, they would demonstrate

that the Wilsons' indebtedness to Spurr Enterprises was satisfied due to the impairment or conversion of the collateral by Spurr Enterprises or Jerry Spurr or Patty Spurr individually and that Spurr Enterprises abused legal processes in obtaining the prejudgment attachment order through false and misleading statements to the trial court and in the course of the self-help execution of that order. Therefore, there are questions of material fact which render the trial court's summary judgment on the Plaintiff's complaint and the Defendants' counterclaim and third-party claim erroneous. Accordingly, we reverse the summary judgment entries. We also vacate the award of attorney fees pursuant to IC 34-52-1-1, and we remand with instructions to the trial court to grant the Wilsons' request for jury trial on the complaint and counterclaim.

Reversed and remanded.

CRONE, J., concurs.

BAILEY, J., dissents with separate opinion.

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MADELINE WILSON, on behalf of herself and her deceased husband, DON WILSON,	)	
Appellant-Defendant,	)	
vs.	)	No. 83A05-0509-CV-508
SPURR ENTERPRISES, INC.,	)	
Appellee-Plaintiff,	)	
and	)	
JERRY SPURR and PATTY SPURR,	)	
Appellees-Third Party Defendants.	)	

BAILEY, Judge, dissenting

I respectfully dissent from the reversal of summary judgment upon Wilson's counter-claim for abuse of process. A trial court's order on summary judgment is cloaked with a presumption of validity; the party appealing from a grant of summary judgment must bear the burden of persuading this Court that the decision was erroneous. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied.

An abuse of process claim consists of two elements: (1) an ulterior purpose, and (2) a willful act in the use of process not proper in the regular conduct of the proceeding. See Reichart v. City of New Haven, 674 N.E.2d 27, 31 (Ind. Ct. App. 1996), trans. denied. A party may not be held liable for abuse of process if the "legal process has been used to accomplish an outcome which the process was designed to accomplish." Id. Rather, an action for abuse of process "requires a finding of misuse or misapplication of process for an end other than that which it was designed to accomplish." Watson v. Auto Advisors, Inc., 822 N.E.2d 1017, 1029 (Ind. Ct. App. 2005), trans. denied (citing Nat'l City Bank, Ind. v. Shortridge, 689 N.E.2d 1248, 1252 (Ind. 1997), opinion supplemented on other grounds, 691 N.E.2d 1210 (Ind. 1998)).

In support of its motion for summary judgment, Spurr Enterprises designated Wilson's answers to interrogatories, wherein she acknowledged owing a debt to Spurr Enterprises. Spurr Enterprises also designated the affidavit of Jon Spurr ("Jon"), wherein he averred that he commenced an action to collect unpaid storage fees, saw a newspaper advertisement for Wilson's moving sale, and obtained a pre-judgment attachment order after posting a cash bond of $1,800.00. Jon further averred that he and Wilson's attorney, Rowdy Williams, agreed that the proceeds from the yard sale would be tendered to Jon, Jon would "make copies," and turn the actual proceeds over to Williams. (App. 122.) Thus, Spurr Enterprises made a prima facie showing that it acted in furtherance of a proper purpose, i.e., to secure collateral for the payment of a debt.

Wilson then designated materials tending to show that Jon acted overzealously, and with insensitivity toward her husband's medical condition.[2] Moreover, although the Sheriff was the proper party to execute the attachment order, Jon personally delivered the attachment order and seized funds and checks. Nevertheless, Wilson did not then come forward with evidence that legal process had been used by Spurr Enterprises to accomplish an outcome other than that which the process was designed to accomplish. Nor did Wilson come forward with evidence of an ulterior motive. As the materials designated by Spurr Enterprises negated the elements of an abuse of process claim, and Wilson did not come forward with evidence to rebut the prima facie showing, Spurr Enterprises was entitled to summary judgment upon the abuse of process claim.

Secondarily, there were two summary judgment matters before the court. One is the focus of the majority's opinion on whether Spurr was entitled to summary judgment on Wilson's abuse of process claim. The second summary judgment concerned Spurr's claim for rents due on the storage facility. Summary judgment was granted on both issues and a subsequent determination of damages was made at a fact-finding hearing. No one challenges the propriety of the summary judgment on the debt or the damages that were determined to be due and owing as a result of this debt. Therefore, I find it curious that the majority now believes that Wilson is entitled to a jury trial on Spurr's collection claim. I find it of no value

[2] The record does not establish that at the time of the events at issue that Jon knew of the terminal condition of Wilson's husband. Assuming that Jon had such knowledge, I would agree with Wilson that his behavior was grossly insensitive. Nevertheless, we are here concerned with distinct facts for a cause of action alleging abuse of process and may not convert it to a cause of action for "gross insensitivity," a cause of action that does not exist.

to reverse and remand for a jury trial where the defendant has repeatedly admitted the debt and the trial court found as much.

Moreover, if the majority truly believes that Wilson is entitled to some relief, I believe that it is more appropriate to remand to establish the actual hours expended by Spurr's attorney in defending against the allegedly spurious claim of abuse of process upon which attorney fees were awarded, rather than to re-define the elements necessary to prove abuse of process. From the record, there appears to be a scant amount of time and effort expended by Spurr's attorney in defending against this claim for which a significant amount of attorney fees were awarded.